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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) FCC 94-191
)
Implementation of Sections 3(n))
and 332 of the Communications Act) GN Docket No. 93-252
)
Regulatory Treatment of)
Mobile Services)

To: The Commission

COMMENTS OF THE RURAL CELLULAR ASSOCIATION

RURAL CELLULAR ASSOCIATION

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SUMMARY

The RCA is an association comprised of small cellular operators that are affiliated with rural telephone companies who provide cellular service to rural America. RCA member companies hold cellular licenses for geographic areas defined by the Commission as Rural Service Areas ("RSAs") and Metropolitan Statistical Areas ("MSAs"). Additionally, RCA member companies are involved in non-equity relationships (i.e., management agreements, joint marketing agreements, and/or resale agreements). The RCA does not believe that such non-equity relationships should be attributable for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general Commercial Mobile Radio Service ("CMRS") spectrum cap because managers, marketing agents and resellers do not have control of the underlying spectrum.

The proposal to attribute non-equity relationships for purposes of the spectrum cap will unnecessarily inhibit the provision of radio-based telecommunications services to rural America. Furthermore, placing a spectrum cap on rural telephone companies will violate the congressional directive set forth in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") which requires the FCC to adopt rules that ensure that spectrum is awarded in a manner that promotes the provision of service to rural America and the participation by rural telephone companies in the provision of that service.

In order to best serve the public interest, including those living in rural America, the RCA respectfully requests that if non-equity relationships are attributable to managers, marketing agents or resellers, that non-equity relationships not be attributable to cellular and other CMRS licensees affiliated with rural telephone companies.

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and 332 of the Communications Act) GN Docket No. 93-252
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Regulatory Treatment of)
Mobile Services)

To: The Commission

COMMENTS OF THE RURAL CELLULAR ASSOCIATION

The Rural Cellular Association ("RCA"), by its attorney and pursuant to Section 1.415 of the Commission's Rules, submits the following comments in response to the Second Further Notice of Proposed Rulemaking ("SFNPRM") in the above-captioned proceeding released by the Federal Communications Commission ("FCC" or "Commission") on July 20, 1994.

I. STATEMENT OF INTEREST

The RCA is an association comprised of small cellular operators providing service to rural America. RCA's members serve over eighty licensed areas across the country encompassing approximately 6.5 million people. The majority of the area served by RCA member companies is rural in nature. RCA member companies are affiliated with rural telephone companies.¹ In its SFNPRM,

¹ Section 1.2110(b)(3) of the Commission's rules currently defines a rural telephone company as an independently owned and operated local exchange carrier with 50,000 access lines or fewer,

the Commission seeks comment on whether it should consider certain additional non-equity relationships (e.g., management contracts, joint marketing agreements and resale agreements) to be attributable for purposes of applying the 40 MHz limitation on ownership of Personal Communications Services ("PCS") spectrum, the PCS-cellular cross-ownership rules, or a more general Commercial Mobile Radio Service ("CMRS") spectrum cap.² RCA member companies currently use 25 MHz of spectrum to provide cellular service to their subscribers within geographic areas defined by the Commission

and serving communities with 10,000 or fewer inhabitants. In its Petition for Reconsideration filed on June 3, 1994 in response to the Commission's "Second Report and Order" in Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, 59 Fed. Reg. 22,980 (1994) ("Second R&O"), the RCA requested that the FCC modify this definition by changing the conjunctive "and" to the disjunctive "or." The RCA argued that if the definition is changed to allow companies to qualify as a rural telephone company based on either the number of access lines they serve or the population of each of the communities served, more rural telephone companies would be eligible for bidding preferences, thereby increasing the chance that new radio-based services will be licensed to entities that will provide the service to rural areas. Moreover, from a historical perspective, a broader definition of rural telephone companies will increase the likelihood of new, innovative radio-based technology coming to rural America. In its Fifth Report and Order in PP Docket No. 93-253, released July 15, 1994, the Commission adopted a broader definition of "rural telephone company" for purposes of the broadband PCS auctions. In this context a rural telephone company is a local exchange carrier having 100,000 or fewer access lines, including all affiliates. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, (released July 15, 1994) ("Fifth R&O") at para. 198.

² In Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, "Further Notice of Proposed Rulemaking" (released May 20, 1994) (Spectrum Cap Notice), the Commission tentatively concluded that the cap should be 40 MHz. Spectrum Cap Notice at para. 93.

as Rural Service Areas ("RSAs") and Metropolitan Statistical Areas ("MSAs"). RCA member companies are also involved in management agreements, joint marketing arrangements and resale agreements. Accordingly, RCA member companies will be affected by any decision to attribute ownership based on non-equity relationships for the purposes of limiting spectrum aggregation within a geographic area.

Additionally, the Commission seeks comment on whether any attribution rules adopted with respect to such non-equity relationships should apply to designated entities. SFNPRM at para. 4. RCA member companies are rural telephone companies and are therefore considered designated entities. RCA member companies will thus also be affected should the Commission determine that non-equity relationships are attributable to an entity when determining the amount of spectrum an entity controls is within the same geographic area.

II. BACKGROUND

Historically, rural telephone companies have been the only providers of telecommunications services in rural areas. Larger companies have chosen not to provide telephone service to these less economically desirable areas. The commitment these telephone companies have made to provide their subscribers with new telecommunications services is readily demonstrated by their quick roll-out of cellular services in the rural markets and the recent construction of radio-based wireless cable systems to provide video services to rural America.

The FCC and Congress have also recognized the commitment of rural telephone companies to serving the needs of rural subscribers and have afforded rural telephone companies appropriate treatment in recognition of this commitment. In 1984, Congress created a "rural exemption" to its telephone cable cross-ownership prohibition in order to ensure that cable service was made available to rural America.³ More recently, Congress specifically mandated that the Commission award licenses for new technologies in a manner that promotes the following objectives:

- 1) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; and
- 2) the promotion of accessibility of new technology to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

See Budget Act, Section 309(j)(3). In the process of implementing this mandate for the broadband PCS proceeding, the Commission adopted rules that increase the cellular ownership attribution benchmark from 20 percent to 40 percent when determining whether a rural telephone company's cellular interests will be attributable to the rural telephone company for purposes of broadband PCS eligibility.⁴

³ 47 U. S. C. § 533 (b)(3) (1993).

⁴ See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700 (1993) ("Broadband PCS Order"), recon., Memorandum Opinion and Order, FCC 94-144 (released June 13, 1994) ("Broadband PCS Reconsideration Order").

III. DISCUSSION

The Commission is concerned that several non-equity relationships, specifically management agreements, joint marketing agreements and resale agreements, may lend themselves to limiting competition in the marketplace. In order to assure that the marketplace remains competitive, the Commission is examining whether these non-equity relationships should be attributable to the entity with the non-equity interest for purposes of applying a spectrum cap. As with its previous Spectrum Cap Notice, the Commission seeks comment on whether a spectrum cap would curb the ability of entities having non-equity interests to obtain excessive market power. If it determines that spectrum caps are warranted, the Commission seeks comment on, inter alia, whether members of the congressionally mandated designated entity group which includes rural telephone companies should be treated differently. RCA addresses both of these issues below.

A. Spectrum Caps Should Not Be Applied to Entities Having Non-Equity Interests in CMRS Licenses.

RCA does not believe that it is necessary for the Commission to adopt attribution rules for entities that have non-equity relationships with the underlying CMRS licensee. The Commission's current rules and case precedent prohibit entities with non-equity relationships to CMRS licensees from exercising control over the licensee. Violation of these rules would subject the licensee to severe monetary sanctions and potential loss of the FCC license. Moreover, anticompetitive behavior in the form of collusion is

prohibited by the antitrust laws. Managers, resellers, and those participating in joint marketing arrangements do not possess control over the spectrum. Accordingly, the spectrum should not be attributed to them for purposes of the Commission's CMRS spectrum cap rules.

1. Management Agreements

The Commission has expressed concern that management agreements permit the manager to market sensitive information (e.g., business plans, customer lists, product and service development, marketing strategies), and that if the manager is also a licensee offering a competing service, access to this information might enable it to impede vigorous competition. SFNPRM at para. 6. The Commission's concern is misplaced. The scenario it envisions is unlikely to occur absent manager deception or licensee incompetence. Any CMRS licensee that enters into a management agreement with an entity that provides a competing service does not possess keen business sense. If vigorous competition is truly to abound, the Commission should not design regulations that protect those with poor business acumen. Besides, as the Commission aptly pointed out in the SFNPRM, there are well established criteria for determining whether a licensee, through a management agreement or otherwise, has contravened the Commission's Rules by relinquishing control of and responsibility for its licensed facilities.⁵

⁵ See Intermountain Microwave, 24 RR 983 (1963); Cellular Control Notice, 1 FCC Rcd 3 (1986); News International, PLC, FCC 2d 349 (1984); Lorraine Journal v. FCC, 351 FCC 2d 824, 828 (D.C. Cir. 1965) cert denied, 383 U.S. 967 (1966).

The Commission also seeks comment on how non-equity relationships in the designated entity context balance the need to allow designated entities to attract needed expertise, capital and infrastructure against the desire to avoid the creation of fronts or shams.⁶ With respect to these relationships, RCA believes that the risk of losing a high cost license attained through the auction process through violation of the current transfer of control rules will be more than enough incentive to prevent designated entities from transferring de facto control to a managing entity.

2. Resale Agreements

The Commission has tentatively decided that a reseller cannot exercise effective control over the spectrum on which it provides service or have the ability to reduce the amount of service provided over that spectrum because other resellers can enter into similar resale arrangements. SFNPRM at para. 13. RCA agrees with the Commission and sees no reason to attribute the spectrum of the underlying service provider to the reseller.

3. Joint Marketing Agreements

The Commission also seeks comment on whether joint marketing agreements should constitute an attributable interest. SFNPRM at para. 14. The Commission defines a joint marketing agreement as an agreement among two or more CMRS providers to pool their resources to market their services to consumers. SFNPRM at para. 14. The FCC suggests that "[o]ne aspect of this joint venture may be to market the services of various CMRS providers under a common name."

⁶ SFNPRM at para. 4.

Id. Under this scenario, cellular licensees that have entered into a licensing agreement to use "MobiLink" or "Cellular One" for marketing purposes could have the interests of all cellular licensees using that name attributed to it, thereby preventing cellular licensees from obtaining CMRS licenses in markets outside of their licensed service areas. RCA cautions the Commission not to create problems where they do not exist. These licensing and joint marketing agreements do not act as an impediment to vigorous competition. In contrast, competition is robust due to these competing market forces as is evidence by the number of cellular subscribers that switch from one competing service to the other.

In the FNPRM, the Commission compares the broadcast radio industry to the CMRS industry in an attempt to find support for attributing joint marketing arrangements to CMRS providers. In its broadcast radio rules⁷, the Commission allows joint advertising sales, shared technical facilities and joint programming arrangements (a.k.a. "time brokerage") but attributes interests in these joint ventures to the participating licensees. However, such attribution is based on an underlying premise unique to broadcast communications. In the broadcast context, the Commission's primary concern is with program diversity and content. Such concerns do not underlie the Commission's regulation of common carriers. The CMRS provider, like any common carrier, is merely a conduit for the

⁷ Revision of Radio Rules and Policies, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2748-89 ("Radio Ownership Rules"), recon. 7 FCC Rcd 6387, 6400-02 (1992) ("Reconsideration of Radio Ownership Rules").

message and does not retain any control over the content of the message. Accordingly, broadcast law provides no support for the attribution of joint marketing agreements to CMRS providers. As long as a CMRS licensee retains control over its licensed facilities, it should be permitted to enter into joint marketing arrangements without having the interests of the other CMRS licensee attributed to it.

B. In the Event the Commission Determines that Non-Equity Interests Are Attributable, Rural Telephone Companies Should be Exempt.

In the event, the Commission determines that it is in the public interest to adopt rules that attribute non-equity relationships to managers of CMRS systems, resellers or CMRS providers who have entered into joint marketing arrangements, rural telephone companies should be exempt from its application.

Traditionally, rural telephone companies have been the only providers of telecommunications services in rural America. The RCA submits that the Commission's positive experience with the rapid and efficient provision of rural cellular radio service by rural telephone companies attests to the validity of awarding special consideration in the instant proceeding. To the extent that these attribution rules may produce any public interest benefit, any such benefit will be outweighed by the detriment which would result from the application of the restrictions to rural telephone companies. In light of the clear directive that new radio-based services be provided to rural America and that licenses

be disseminated to rural telephone companies, a rule that burdens rural telephone companies with attributable non-equity relationships is insupportable. Entities which qualify as "rural telephone companies" should not be frustrated in their attempt to continue their commitment to bring new technologies to rural America simply because of their prior record of fulfillment of their commitment to rural America. The Commission's proposed attribution rules with respect to non-equity ownership interests would severely limit the provision of CMRS services to rural America.


The RCA beseeches the Commission not to craft rules that deny residents and businesses located in rural America the benefits of new technologies merely by virtue of their location. Accordingly, in the event the Commission determines that non-equity relationships should be attributable to an entity when determining the amount of spectrum an entity controls within the same geographic area, the RCA requests an exemption for rural telephone companies.

IV. CONCLUSION

As discussed above, RCA does not believe that non-equity relationships should be attributable to an entity when determining the amount of spectrum an entity controls within the same geographic area. In particular, such interests should not be attributable to rural telephone companies. RCA reminds the Commission that Congress has explicitly defined the public interest as requiring special regard to and accommodation of the needs of rural America. Congress has recognized the desirability of fostering participation by rural telephone companies in the provision of new radio-based services, including PCS and other broadband spectrum. Recognition of the unique circumstances surrounding the provision of radio-based services provided to rural America by rural telephone companies should guide the Commission to a finding that non-equity attribution rules should not be applied to rural telephone companies. Such a finding is consistent with the congressional mandate and will serve the public interest.

Respectfully submitted,

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August 9, 1994

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